

Dear Mr. President:

We are writing to help ~~secure ensure that your are~~ election victory ~~ased~~ President of the United States. We have prepared an analysis of one pivotal, post-election scenario, and have provided recommendations below, so that your legal team may better prepare to secure your election victory.

I am a Senior Fellow of the Claremont Institute and a constitutional scholar at Chapman University, with 25 years of experience in constitutional law, including testimony before the Florida legislature during the Bush v. Gore election in 2000. I contributed to the "79 Days to Inauguration Taskforce Report: A Project of the Claremont Institute and the Texas Public Policy Foundation" that was recently provided to you. Newt Gingrich previously shared with you an email from Mr. Colbert, director of a public policy organization, regarding a separate "Heritage and Spiritual Renewal Movement Conceptual Proposal."

Our recommendations are in addition to those provided by the 79 Days Report, and are focused on the crucial legal actions that the Trump campaign and Republicans must take, in the decisive, two-week timeframe from January 6 to January 20, 2021.

Starting at the joint session of Congress on January 6 to count the electoral votes, the President of the Senate would may have received multiple Certificates of Vote from several battleground states. Democrat Governors, Electors, and Legislatures would could have sent separate timely, authoritative, and conclusive certificates with competing slates of electoral votes, leading to disputes in Congress over which certificates and votes to count.

Guidance from the U.S. Constitution and statutes regarding decision making and proceedings to resolve these disputes is ambiguous and open to legal challenge.

The Trump campaign and Republicans must proactively take charge of this situation to establish the path to achieve victory. In contrast, Democrats win by disruption, delay, and default through the appointment of a Democrat Speaker as an Acting President by succession on January 20.

The U.S. Supreme Court is the only appropriate body to provide clarification, guidance, and resolution of these constitutional issues. A proposed bipartisan commission, including Never Trump Republicans, to guide the resolution of these issues, would be fraught with problems, and would bypass and usurp a conservative Supreme Court. The Court must treat the January 20, 2021 deadline with the same gravity and urgency as it did the December 12, 2000 deadline in *Bush v. Gore*.

We recommend that the Trump campaign and Republicans seek injunctions from the Court, ordering:

[Several problems here; first, I don't think this qualifies as an exercise of the Supreme Court's original jurisdiction, so a case would have to be brought first in the D.C. District Court] [The injunctions arise from comments raised in the article: "Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management" by Never Trumper Edward B. Foley, on pp. 348-351. They indicate a direct path to the Supreme Court.]

1) That the President of the Senate decides authoritatively what "certificates" from the states to "open" and what electoral votes are "counted," under the 12th Amendment and the Electoral Count Act of 1887, 3 U.S.C. § 15.

[I don't agree with this. The 12<sup>th</sup> Amendment only says that the President of the Senate opens the ballots in the joint session and then, in the passive voice, that the votes shall then be counted. 3 USC § 12 says merely that he is the presiding officer, and then it spells out specific procedures, presumptions, and default rules for which slates will be counted. Nowhere does it suggest that the President of the Senate gets to make the determination on his own. § 15 doesn't, either.]

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What you are citing is one-half of the arguments presented in the article: "Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management" by Edward B. Foley, on page 321 in the last two paragraphs, p. 324 third new paragraph, p. 325, and p. 326 first new paragraph, with a scenario on p. 334, and pp. 337-338. This injunction is intended to resolve these opposing arguments.

2) That, if there are two or more conflicting, timely, authoritative, and conclusive certificates of electoral votes from the same state, and there is a dispute between the Legislature and the Governor or the popular vote, then the Legislature, not the Governor or the popular vote, determines the appointment of electors, in accordance with Article II, Section 1, Clause 2 of the U.S. Constitution. [As an alternative, the Court would order Congress to count certain disputed electoral votes].

[I don't agree with this either. Article II says the electors are to be appointed "in such manner as the Legislature thereof may direct," but I don't think that entitles the Legislature to change the rules after the election and appoint a different slate of electors in a manner different than what was in place on election day. And 3 U.S.C. § 15 gives dispositive weight to the slate of electors that was certified by the Governor in accord with 3 U.S.C. § 5.]

This anticipates the same rules that were in place on election day, as you mentioned, and is the situation of multiple certificates/slates of electors, given by Foley on p. 324 first new paragraph and p. 340 3<sup>rd</sup> – 5<sup>th</sup> paragraphs, with further discussion of the Electoral Count Act on pp. 229-333. The scenarios illustrate the ambiguities in the laws regarding dispositive weight, which the injunction is intended to resolve.

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3) That, if Congress decides what electoral votes are "counted," when there are objections raised by Members of Congress to any state's certificates of vote, including individual votes, and there is a dispute between the Houses regarding the counting of votes, then only those votes are counted in which both Houses concur, under 3 U.S.C. § 15. This would preclude the two Houses from creating separate, determinative vote counts from which each of the Houses maintains a differing tally.

Again, I don't think this is right. In such a circumstance, 3 U.S.C. § 15 gives dispositive weight to the slate of electors that was certified by the Governor in accord with 3 U.S.C. § 5.

This idea of both Houses concurring, under 3 U.S.C. § 15, is discussed by Foley in the pages given in the section above. The purpose of this injunction is to avoid Foley's scenario of the two Houses maintaining differing tallies.

4) That, if Congressional Democrats walk out of the joint session in protest, and refuse to participate in further votes (e.g., as done in Oregon in 2019 and 2001 and in Rhode Island in 1924), and both Houses indefinitely lack quorums under the 12th Amendment, then the Members of Congress [must] **shall** attend the joint session and fulfill their constitutional obligations to choose the President and the Vice President, in accordance with the 12th Amendment and their obligations under their Oath of Office to "support and defend the

Constitution of the United States," and in accordance with Art. I, § 5, cl. 4 and with 3 U.S.C. § 16, which states, "Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared." **Members of Congress, who fail to attend the joint session shall be deemed present and to have forfeited their votes. The two tellers in the Senate shall be sufficient to make a list of the votes for each of the Houses.** [As an alternative, the Court would order that the President of the Senate authoritatively decide which electoral votes to count and authoritatively continue the joint session and move on to the next state without quorums and with the two tellers in the Senate being sufficient to make a list of the votes for each of the Houses, in accordance with the 12th Amendment and 3 U.S.C. § 15-18].

I don't think a Court is going to give us such an order.

This order is discussed by Foley on p. 342 first new paragraph, p. 348 first and second new paragraphs, and p. 351 top paragraph. The 79 Days Report states, "the Vice President orders the Sergeant-at-Arms to arrest the Members and bring them to the chamber. A quorum is established." How confident are you that Members will be bought back in a timely manner and that this action will be conclusive and bring finality? Who would order and arrest House Members that walk out of the joint session of Congress? If you have full confidence that this will bring finality, then this injunction would be unnecessary, and the paragraph below, without the Supreme Court, would suffice.

In addition, another question is: What is the mechanism for stopping Congress from continuing disputes in the electoral vote count indefinitely, and from thereby having the Speaker appointed Acting President? If Member's objections to electors run out the clock to January 20 – 40 objections from 280 Democrats would do that – what could prevent that from happening? If we do not provide an enforcement mechanism, then the Speaker of the House will become the Acting President by default under this scenario. An injunction is intended to provide that necessary enforcement mechanism. Addressing this situation is crucial to the outcome of who will become President.

[This paragraph may be unnecessary given the above paragraph]. I actually think it is necessary; indeed, I would delete the above and include only this. If the Houses lack quorums, President Trump would need to call the House and the Senate back to a special joint session of Congress to obtain quorums, and would need to enforce attendance by Members through a ruling by the U.S. Supreme Court. Article II, Section 3 of the Constitution provides that the President "may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper." Art. I, § 5, cl. 4 provides: "Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days...." Further, 3 U.S.C. § 16 provides: "a recess of such House not beyond the next calendar day...before the fifth calendar day next after such first meeting of the two Houses."

The idea here is that the Congress was in joint session to fulfill the constitutional obligation of appointing electors, but walked out. Here, the President of the United States has called them to a special joint session, but what is to stop them from walking out again? Again, it comes down to: How confident are you that the arrests described in the previous comments above would be conclusive and bring finality to this? As mentioned above, what is the enforcement mechanism for Congress to attend the President's joint session? Again, if you have full confidence that this will bring finality, then the injunction would be unnecessary, and this paragraph, without the Supreme Court, would suffice.

**Commented [EJ1]:** I don't agree with this, either. Why is a Supreme Court ruling necessary for the President to take the steps necessary based on his own authority?

5) That, if **no person has a majority of electors appointed** [there is a tie in the number of electors appointed] for President, and if the Speaker of the House **of Representatives** prevents an immediate vote on the President by states, then the House [must] **shall** immediately both seat the remaining potential Members and fulfill the House's constitutional obligation for a vote, in accordance with the 12th Amendment.

Here, the 79 Days Report states, "the President calls the House into session." If Democrat House Members walk out, how would House Members be arrested and brought back to the chamber? Again, it comes down to: How confident are you that the arrests described in the previous comments above would be conclusive and bring finality to this?

In the House, if the Speaker considers not calling the House to vote by state, but the President calls the House into session, then does the House absolutely have to vote? What enforces this?

In addition, though the majority's power to determine the membership of the body, House or Senate, is absolute, what happens when a House fails to exercise that power in a timely manner, in other words, what enforces the timely exercise of that power (i.e., by January 20)? Since the Congressional Research Service cites cases where the Supreme Court has issued rulings regarding the seating of Members, what would prevent a Supreme Court injunction from ordering a House to exercise its absolute power within a constitutionally determined time limit (i.e., January 20). What would prevent the Court from providing each of these necessary enforcement mechanisms?

If the **actions and** injunctions above are overlooked, then the Democrats' strategy would prevail, as Hillary Clinton said, "Joe Biden should not concede under any circumstances because I think this is going to drag out, and eventually I do believe he will win if we don't give an inch and if we are as focused and relentless as the other side is." The terms of the President and the Vice President end on January 20 at 12:00 p.m., under the 20th Amendment. Military personnel would support and defend the Constitution. Joe Biden would be proven correct in saying, "I am absolutely convinced they will escort him from the White House with great dispatch." The Acting President would nominate a Vice President, who would take office upon confirmation by a majority vote of both Houses of Congress, under the 25th Amendment.

We trust that these recommendations will help your legal team prepare vital legal briefs to the U.S. Supreme Court in time for January's decisive two weeks. "Chance favors the prepared mind," said Louis Pasteur. **It is good to be prepared for all eventualities.** We would be pleased to provide any additional information and assistance, such as supporting arguments and citations. We look forward to your timely response.

Most Respectfully,

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